

Order

**Michigan Supreme Court
Lansing, Michigan**

February 18, 2015

Robert P. Young, Jr.,
Chief Justice

ADM File No. 2014-09

Stephen J. Markman

Mary Beth Kelly

Brian K. Zahra

Proposed Amendment of
Rule 7.215 of the Michigan
Court Rules

Bridget M. McCormack

David F. Viviano

Richard H. Bernstein,
Justices

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.215 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [Administrative Matters & Court Rules page](#).

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text
is shown by strikeover.]

Rule 7.215 Opinions, Orders, Judgments, and Final Process for Court of Appeals

- (A) Opinions of Court. An opinion must be written and bear the writer's name or the label “per curiam” or “memorandum” opinion. An opinion of the court that bears the writer's name shall be published by the Supreme Court reporter of decisions. A memorandum opinion shall not be published. A per curiam opinion shall not be published unless one of the judges deciding the case directs the reporter to do so at the time it is filed with the clerk. A copy of an opinion to be published must be delivered to the reporter no later than when it is filed with the clerk. The reporter is responsible for having those opinions published as are opinions of the Supreme Court, but in separate volumes containing opinions of the Court of Appeals only, in a form and under a contract approved by the Supreme Court. An opinion not designated for publication shall be deemed “unpublished.”
- (B) Standards for Publication. A court opinion must be published if it:

- (1) establishes a new rule of law;
 - (2) construes as a matter of first impression a provision of a constitution, statute, regulation, ordinance, or court rule;
 - (3) alters, ~~or modifies, or reverses~~ an existing rule of law ~~or extends it to a new factual context~~;
 - (4) reaffirms a principle of law or construction of a constitution, statute, regulation, ordinance, or court rule not applied in a recently-reported decision since November 1, 1990;
 - (5) involves a legal issue of significant~~continuing~~ public interest;
 - (6) criticizes existing law; or
 - (7) ~~creates or resolves a an apparent conflict among unpublished Court of Appeals opinions brought to the Court's attention of authority, whether or not the earlier opinion was reported~~; or
 - (8) [Unchanged.]
- (C) Precedent of Opinions.
- (1) An unpublished opinion is not precedentially binding under the rule of stare decisis. Citation to such opinions in a party's brief is disfavored unless the unpublished opinion directly relates to the case currently on appeal and published authority is insufficient to address the issue on appeal. A party who cites an unpublished opinion shall explain why existing published authority is insufficient to resolve the issue and must provide a copy of the opinion to the court and to opposing parties with the brief or other paper in which the citation appears.
 - (2) [Unchanged.]
- (D)-(J)[Unchanged.]

Staff Comment: The proposed amendments of MCR 7.215(A)-(C) were submitted by the Court of Appeals. Proposed MCR 7.215(A) would clarify the term “unpublished” as used in the rule. The proposed amendment of MCR 7.215(B) would provide more specific guidance for Court of Appeals judges regarding when an opinion should be published. Finally, in response to what the Court of Appeals describes as an increased reliance by parties on unpublished opinions, the proposed revision of MCR 7.215(C)

would explicitly note that citation of unpublished opinions is disfavored unless an unpublished decision directly relates to the case currently on appeal and published authority is insufficient to address the issue on appeal.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by June 1, 2015, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2014-09. Your comments and the comments of others will be posted under the chapter affected by this proposal at [Proposed & Recently Adopted Orders on Admin Matters page](#).

MARKMAN, J. (*concurring in part and dissenting in part*). I support publishing for comment the proposed amendments of MCR 7.215(A), which would clarify the term “unpublished,” and MCR 7.215(B), which would revise the standards regarding when an opinion of the Court of Appeals should be published so that our court rule better conforms to the real-world practices and available resources of that Court. However, I would not publish for comment the proposed amendments of MCR 7.215(C), which provide that citing an unpublished opinion is “disfavored” and should only be done when a published opinion is “insufficient” to address the issue on appeal, and would further require an “explanation” of “why existing published authority is insufficient to resolve the issue” I would not publish this proposal any more than I would publish a proposal disclaiming reliance by our judiciary on the principle of stare decisis. In my judgment, the proposed amendments of MCR 7.215(C) represent a solution in search of a problem and misperceive the nature of the judicial exercise.

The judiciary of our state possesses one principal authority, the exercise of the “judicial power,” Const 1963, art 6, § 1, the power to resolve “cases or controversies.” *People v Richmond*, 486 Mich 29, 34 (2010). This power can be exercised through a variety of traditional forms-- published opinions, unpublished opinions, authored opinions, per curiam opinions, and memorandum opinions. Each of these must conform to the requirements of the law, and each carries the force of law. Concerning the former proposition, this signifies that the substance of each of these forms of opinion will be in accord with the principles and practices of the rule of law in which persons stand equally before the law and in which disparate treatments must be reasonably justified. Concerning the latter proposition, this signifies that each of these forms of opinion will constitute the bona fide law of this state and will contribute case by case to defining the body of law from which the precedents of this state must be identified. That is, while

these distinct forms of caselaw may serve different practical purposes of judicial decision-making, each has in common that it constitutes the genuine corpus of this state's law, both being derived from traditional sources of the law—the Constitution, statutes, ordinances, and the common law-- and serves in turn as the basis of future law.

An unpublished opinion is not unpublished because it states a second-class, an ersatz, or a quasi- law. Rather, it is unpublished because a Court of Appeals panel has determined pursuant to MCR 7.215(B) that it would be repetitive of an published opinion; that the factual circumstances of a case are relatively unique and unlikely to be replicated; or that, for one reason or another, a case is of limited practical significance. An unpublished opinion, however, is not unpublished because it does not constitute “real” law. If an unpublished opinion constituted something other than “real” law-- if, for example, it was derived from something other than a traditional source of the law, or if it would not supply an appropriate basis for the future development of the law-- the opinion would simply not constitute a legitimate product of the “judicial power,” and thus it should not have been undertaken by a court of law in the first place. Most certainly, an unpublished opinion is not a judicial form by which to “bury” a decision that is in discord with the law of this state.

It is certainly understandable why an unpublished opinion would typically be of less practical citational value than a published opinion, for the former tend to be more succinct, be less detailed in their analyses, be less thorough in their description of factual backgrounds, and pertain to matters of legal dispute about which a more thorough and more helpful published opinion exists. But these merely reflect the practical limitations of the unpublished opinion form. When for whatever serendipitous or other reason an unpublished opinion *does* communicate a legal principle deemed by a litigant to be relevant in a later case, there is, in my judgment, no principled reason why it should not be drawn to the attention of a later court or why it should be “disfavored” from consideration by our court rules. Perhaps by not publishing an opinion, the Court of Appeals erred in its assessment that there was a published opinion that better articulated relevant legal principles; perhaps there were specific facts that served to render the earlier case particularly on-point regarding a later case; or perhaps the sheer passage of time had come to cast unexpected or unanticipated new light on the value of an existing published or unpublished opinion. I do not know why in these or in other appropriate circumstances a party should be constrained from assessing the fullness of the existing law of this state in search of applicable precedents, or why opposing parties (and the courts) should not be required to assess this law by traditional and customary standards.

While I recognize that unpublished Court of Appeals opinions do not, under current rules, constitute binding precedent (that is a matter for another day's discussion), MCR 7.215(C)(1), I see no reason why they should be foreclosed from being invoked as persuasive authority. Indeed, this Court itself has been persuaded by unpublished opinions. See, for example, *Cedroni Assoc, Inc v Tomblinson, Harburn Assoc, Architects*

& Planners, Inc, 492 Mich 40, 51 (2012) (“Although *Mago*^[1] is an unpublished and therefore non-binding opinion of the Court of Appeals, and, as the dissent points out, the facts in *Mago* are not identical to those in the instant case, we nevertheless find its reasoning persuasive.”); *Tomiak v Hamtramck School Dist*, 426 Mich 678, 698-699 (1986) (“We find the reasoning of the Court of Appeals decision in *Purcell v Ferndale School Dist*, unpublished opinion per curiam, decided November 24, 1982 (Docket No. 59505), persuasive . . .”).

It is obvious that one traditional practical limitation on citing unpublished law--the relative inaccessibility of that law-- has been significantly ameliorated in recent years and serves as no contemporary justification for the present effort to diminish the use of an unpublished Court of Appeals opinion. Indeed, the fact that those opinions are now so easily accessible probably explains the “unmistakable . . . present trend . . . away from no-citation rules.” Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J App Prac & Process 473, 487 (2003). The federal courts are now actually prohibited from restricting the citation of an unpublished federal opinion. See FR App P 32.1(a). As the advisory committee that supported the adoption of this rule explained:

“[A] court should not be able to forbid parties from citing back to it the public actions that the court itself has taken. It is antithetical to American values and to the common law system for a court to forbid a party or an attorney from calling the court’s attention to its own prior decisions, from arguing to the court that its prior decisions were or were not correct, and from arguing that the court should or should not act consistently with those prior decisions in the present case. One member called no-citation rules an ‘extreme’ measure. Another member said that it was ‘ludicrous’ that an attorney cannot cite a court’s prior decisions to the court itself, but can cite those decisions to virtually everyone else in the world, including other courts. Yet another member—a judge—said that judges should not be the only government officials who can shield themselves from being confronted with their past actions.” [Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang Over the Citation of Unpublished Opinions*, 62 Wash & Lee L Rev 1429, 1451-1452 (2005), quoting the minutes of the spring 2004 meeting of the Advisory Committee on Appellate Rules (April 13-14, 2004), p 8.]

By discouraging parties from citing an unpublished opinion, this Court will only deprive itself and the Court of Appeals, and those who argue before these Courts, of “an important tool in managing the development of a coherent body of caselaw””

¹ *Mago Constr Co v Anderson, Eckstein & Westrick, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 8, 1996 (Docket No. 183479).

Barnett, 5 J App Prac & Process at 487 (citation omitted). What is to be gained by instructing those who are the custodians of the law in our bench and bar that they should tie one of their hands behind their back in calling to the attention of appellate courts the considered judicial decisions of previous appellate courts? How are the values of equal treatment under the law furthered by a rule that “disfavors” reliance on a class of judicial decisions that have been decided by persons who have taken judicial oaths of office, and who have conformed to the rules and procedures of the judicial process, and who have abided by the requirements of the adversarial process, and who have rendered judgments to the best of their ability in accordance with the requirements of the laws and constitutions of the United States and the state of Michigan? Given the “unmistakable . . . present trend . . . away from no-citation rules,” *id.*, and the practical and constitutional rationales for this trend, I do not see what purpose would be served if we, and we alone, move toward a no-citation rule. See *id.* (“Since . . . 2001, six states have switched from banning citation to allowing it; two more states are considering proposals to do the same; and *no state* during this period appears to have switched the other way.”) (emphasis added).

In summary, the relatively infrequent citing of an unpublished opinion poses little or no practical burdens on the courts of this state, and its “disfavoring” serves only to further delegitimize a practice that does not warrant that treatment. There is no opinion of the Michigan Supreme Court that is “uncitable,” and there should be no such opinion of the Court of Appeals, an institution of equally legitimate judicial standing and one equally entrusted with responsibility for the exercise of the “judicial power” of this state.



I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 18, 2015

A handwritten signature in black ink, appearing to read "Larry S. Royster".

Clerk